

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 13, 2007

TO : James F. Small, Acting Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: St. Jude Medical Center
Case 21-CA-37748

512-5012-8300

512-5092-3900

This Section 8(a)(1) case was submitted for advice on whether the Employer lawfully excluded from its private hospital grounds nonemployees who were supporting off duty employee engaged in Union organizational handbilling.

We conclude that the Region should dismiss this case because the Board has now concluded that California state law does not clearly prevent employers from asserting their private property rights against nonemployees engaged in labor speech.¹

FACTS

The Employer owns private hospital facilities located at the end of an access driveway from the road. The Union is attempting to organize some of the Employer's employees.

On three occasions in April and May 2007, off duty employees accompanied by nonemployees attempted to distribute a Union newsletter at three Hospital entrances. The Region has concluded that Employer guards unlawfully surveilled the off duty employees and unlawfully ordered them off the hospital's exterior premises. On two of those occasions, Employer guards also ordered the nonemployees off the premises by asserting a policy which bars nonemployees from distributing literature on Hospital property.

ACTION

The Employer lawfully excluded the nonemployees because the Board has now concluded that California does not clearly prevent employers from asserting their private property rights against nonemployees engaged in labor speech.

¹ George L. Mee Memorial Hospital, 348 NLRB No. 15 (2006).

California state law establishes certain exceptions to rights of private property owners to exclude alleged trespassory union conduct from their premises.² Two different lines of California law limit property owners' rights to exclude individuals engaged in peaceful expressive activity related to a labor dispute. First, when private property, such as a large shopping center, has assumed the character of a "traditional public forum or town center, the free speech provision of the California constitution requires the property owner to permit access for peaceful expressive activities.³ This principle is inapplicable here because the Employer's hospital grounds are not a quasi-public forum.⁴

In a second line of cases, California courts have relied on the Moscone Act⁵ to hold that property owners may not deny access to individuals on exterior premises engaged in peaceful expressive activity concerning a labor dispute.⁶ In Winco Foods, Inc.,⁷ the Board held that a stand-alone grocery store had no right under California labor law to exclude union organizers engaged in consumer handbilling from the parking lot and walkways adjacent to its store.

² Glendale Associates, Ltd., 335 NLRB 27, 28 (2001), *enfd.* 347 F.3d 1145 (9th Cir. 2003); Bristol Farms, 311 NLRB at 438-39.

³ Robins v. Pruneyard Shopping Center, 153 Cal.Rptr. at 860-61 & n.5.

⁴ See George L. Mee Memorial Hospital, *supra*, slip op. at 5 (California Constitutional free speech provision "does not apply to properties such as the Respondent's private medical facility that are not public forums.")

⁵ Cal. Code. of Civ. Proc. §527.3.

⁶ Sears Roebuck & Co. v. San Diego District County Dist. Council of Carpenters, 158 Cal.Rptr. 370, 374 (Cal. 1979), *cert. denied* 447 U.S. 935 (1980) (Moscone Act's language "leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity...[declared lawful under prior California law]").

⁷ 337 NLRB 289, 292-294 (2001), *enf. denied sub nom.* Waremart Foods v. NLRB (Waremart II), 354 F.3d 870 (D.C. Cir. 2003) (rehearing *en banc* denied) (stand-alone grocery store precluded from excluding union representatives from exterior premises under Moscone/Sears).

The Board rejected employer contentions that the Moscone/Sears limitation on property rights was preempted or invalid on Fourteenth Amendment equal protection and taking grounds.⁸ However, the continuing validity of such a theory of violation was cast in doubt as a result of the D.C. Circuit's opinion of enforcement in Waremart II.

Independently construing California law on review,⁹ the D.C. Circuit concluded that California could not, under the U.S. Constitution, accord labor activity greater latitude for trespass than other expressive activity.¹⁰ The court found no basis for concluding that California property law, interpreted constitutionally, prohibited the employer from excluding the union agents from the property, and accordingly refused to enforce the Board's Moscone/Sears-based finding of a violation.¹¹ Given clear federal constitutional policy, the D.C. Circuit concluded that if the meaning of the Moscone Act came before the California Supreme Court again, that Court would either declare the statute unconstitutional or construe it differently so as to avoid unconstitutionality.¹²

Previous Advice Memorandum had authorized complaint alleging that a employer interfered with a union's right, as set out in the Moscone Act interpreted in Sears, to access its exterior premises to engage in peaceful labor speech in order to allow Board to consider the viability of the 9th Circuit decision in Calkins.¹³ However, the Board has now concluded that California law does not clearly bar

⁸ 337 NLRB at 289, 289 n.3. Accord: NLRB v. Calkins, 187 F.3d 1080, 1094-95 (9th Cir. 1999), enfg. Indio Grocery Outlet, 323 NLRB 1138, 1142 (1997).

⁹ The circuit court undertook this analysis only after asking the California Supreme Court to consider the issue (Waremart Foods v. NLRB ("Waremart I"), 333 F.3d 223, 227-28 (D.C. Cir. 2003)), and after the California court declined to do so, 354 F.3d at 871.

¹⁰ 354 F.3d at 872-75 (giving special protection to labor speech would be unconstitutional content regulation).

¹¹ Id. at 876-77.

¹² Waremart II, 354 F.3d at 875.

¹³ See Wal-Mart Stores, Case 32-CA-22175, Advice Memoranda dated December 31, 2005 and March 13, 2006; Whole Foods Market, Inc., Case 20-CA-32883, Advice Memorandum dated April 17, 2006.

stand alone facilities from asserting their private property rights against labor speech under the Moscone Act and the Sears decision. In George L. Mee Memorial Hospital, *supra*, the Board considered a hospital policy barring employees and nonemployees from soliciting or distributing for any purpose on hospital premises. The Board found the policy unlawful as to employees but lawful as to nonemployees because the hospital could lawfully assert its property rights to exclude them from its premises.

The Board first found the hospital not to be a public forum and then considered the applicability of the Moscone Act and Sears. The Board found no violation: "the D.C. Circuit has held that Sears does not represent California law . . . Sears cannot be relied upon as controlling California precedent."¹⁴ Since the Board has now clearly dismissed allegations based solely upon the Moscone Act and Sears, we conclude that the Employer here lawfully excluded the nonemployees from its property.

Accordingly, the Region should dismiss these allegations, absent withdrawal.

B.J.K.

¹⁴ Id. slip op. at 5, note 20. Although the Board cited Macerich Management Co., 345 NLRB No. 34, slip op. at 3 (2005), that case involved a shopping center and California's free speech provision.